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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

vs.

FRANCES B. DAVIS,
Respondent.

BRIEF OF THE BOARD OF TRUSTEES OF PRINCE GEORGE'S COMMUNITY COLLEGE AS AMICUS CURIAE

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INTRODUCTION

The Board of Trustees of Prince George's Community College (the "Board") files this brief supporting the position of the Petitioner, Southeastern Community College, as *amicus curiae* pursuant to Rule 42, paragraph 2, the written consents of the parties having previously been submitted to the Clerk of this Court.

The Board is the duly appointed governing board of Prince George's Community College (the "College"), a public institution of higher education located in Prince George's County, Maryland.[1]

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[1] See Annotated Code of Maryland, Education Article (1978 Ed.), Title 16, Subtitle 20.

The College offers a variety of programs of study, including an allied health program in nursing, which is the recipient of Federal financial assistance. The nursing department is approved by the Maryland State Board of Examiners of Nurses and is accredited by the National League of Nursing.

Graduates of the nursing program, a four-semester curriculum which is on record with and approved by the Maryland State Board of Examiners of Nurses, are eligible to sit for the Maryland State Licensing Examination for Registered Nurses.

To graduate from the nursing program, each student must successfully complete the nursing curriculum, which includes five required courses in Principles & Practices of Nursing, totalling 25 credit hours. These required nursing courses consist not only of classroom studies, but also include 6 hours of clinical practice each week during the first semester, and 12 hours of clinical practice each week during the second, third and fourth semesters.

This required clinical practice, which occurs at a number of affiliating hospitals in the Metropolitan Washington, D.C. area, involves the successful performance by each student of a wide variety of specific nursing tasks. These tasks respond to the actual nursing needs of the physically and mentally ill patients at the affiliating hospitals who are being cared for by the student. The tasks increase in complexity and in critical nature as the student progresses through the curriculum, while the extent of supervision decreases.

The purpose of these clinical practice courses is to train the student to meet the actual nursing situations which are encountered in practice by registered nurses. For this

reason, each student deals with maternity cases, infants, sick and disabled patients, the elderely, and the mentally ill; each student feeds, washes, clothes, and transports such patients, gives medications, including hypodermic and intravenous injections, dresses wounds, performs operating room and delivery room duties, participates in various medical and surgical procedures, and performs many other tasks which registered nurses are expected to be able to perform.

Like Southeastern Community College, the College has had a handicapped individual apply for admission to its nursing program, but unlike Frances B. Davis, this applicant does not suffer from hearing deficiencies, but is an epileptic whose condition is not controlled by medication.

By way of example, on April 5, 1978, while meeting with an advisor at the College, this applicant suffered a convulsive episode with no apparent warning, suddenly slid from a chair onto the floor, had muscular contractions, and was unconscious for several minutes.

There is no doubt that this applicant will be unable to perform the tasks required in the clinical practice courses of the College's nursing programs without unreasonable risk for the safety of the patients and the applicant.

THE INTEREST OF THE AMICUS CURIAE

The Board is interested in this case because the decision of the United States Court of Appeals for the Fourth Circuit which is being reviewed, if affirmed, will require the College to admit handicapped students to various programs without regard to the fact that certain handicaps are so disabling that the performance of required course work by a student with such a handicap will create an unreasonable risk to the safety of that student and other persons.

The circuit court below[2] determined that the district court erred in finding that Ms. Davis was not "otherwise qualified" pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, for admission to Southeastern Community College's nursing program, notwithstanding the determination, based on undisputed evidence, that Ms. Davis' hearing disability would prevent her from safely performing the required clinical training.

The Board is interested in this case because under the decision which is the subject of review, the College could not consider the episode of April 5, 1978 in determining whether to admit this applicant to its nursing program.

The Board is concerned about what would have happened happened on April 5, if this epileptic applicant, instead of being seated at her advisor's desk at the time of the seizure, had been holding a newly-born infant, or helping an elderly patient into a wheelchair, or giving an injection, or handing a scalpel to a surgeon in the operating room.

For these reasons, the Board of Trustees of Prince George's Community College files this brief in support of the brief of the Petitioner, Southeastern Community College, and urges that the decision of the United States Court of Appeals for the Fourth Circuit in *Davis v. Southeastern Community College*, 574 F.2d 1158 (CA 4, 1978), be reversed.

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[2] *Davis v. Southeastern Community College*, 574 F. 2d 1158, at 1160, 1161 (CA 4, 1978).

ARGUMENT

IN DECIDING WHETHER TO ADMIT A HANDICAPPED INDIVIDUAL TO A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE, AN INSTITUTION OF HIGHER EDUCATION MAY CONSIDER THAT INDIVIDUAL'S ABILITY TO PERFORM SAFELY THE TASKS WHICH ARE ESSENTIAL TO PARTICIPATION IN THE PROGRAM OR ACTIVITY. FOR THIS REASON, THE INSTITUTION MAY DENY SUCH ADMISSION TO AN INDIVIDUAL WHOSE HANDICAP IS SO DISABLING THAT THE PERFORMANCE OR ATTEMPTED PERFORMANCE OF ESSENTIAL TASKS WILL CREATE AN UNREASONABLE RISK TO THE SAFETY OF THAT INDIVIDUAL AND OTHER PERSONS.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 7(6) of the Act, 29 U.S.C. §706(6) provides, in pertinent parts:

> "The term 'handicapped individual' * * * means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

The district court, construing the statutory language of section 504, gave the words "otherwise qualified" their ordinary common meaning, and concluded,

> "Reasonably construed, these words qualify the passage [section 504] to mean that no person may be excluded from a federally-assisted program or activity solely by reason of the fact that such person is handicapped, unless the nature of the handicap renders the person unable to fully and effectively participate in the activity." *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1345 (DCNC, 1976).

Applying this construction, the district court determined that the Respondent Davis was not "otherwise qualified" because her handicap, "a severe impairment of her ability to hear," would prevent her from safely performing both her clinical nursing training and her proposed profession as a registered nurse. For this reason, the district court found that the Petitioner, Southeastern Community College, had not violated 29 U.S.C. §794 in denying Ms. Davis admission to its nursing program, and entered judgment in favor of the College.

On appeal, the circuit court rejected the "ordinary common meaning" definition given by the district court to the key statutory phrase "otherwise qualified", because while the appeal was pending, the Secretary of Health, Education and Welfare had promulgated implementing regulations, 45 C.F.R. Part 84, containing a definition of "otherwise qualified" which the circuit court construed precluded consideration of the nature of Ms. Davis' handicap in determining whether or not she was "otherwise qualified" for admission to the Petitioner's nursing program. *Davis v. Southeastern Community College*, 574 F. 2d 1158, at 1161, (CA 4, 1978).

The Board, as *amicus curiae*, contends that because Ms. Davis' handicap would prevent the safe performance of

her clinical nursing training, neither section 504 or the H.E.W. regulations (to the extent they may be found valid) precludes the College from considering her handicap and denying her admission to the nursing program.[3]

There is nothing in the Congressional declaration of purpose, Act, section 2, 29 U.S.C. §701, or in legislative history of the Rehabilitation Act to suggest that considerations of safety are to be ignored to permit handicapped individuals to participate in society.

> "The key to the intent of the bill is the Committee's belief that the basic vocational rehabilitation program must not only continue to serve more individuals, but must place more emphasis on rehabilitating individuals with more severe handicaps. It is the bill's intent to be more responsive to the needs of the handicapped individual by providing a better basic program of service as well as emphasis within special project authority for target populations whose needs are not now being met within the basic program. Additionally, the Committee has added provisions designed to focus research and training activities on making employment and participation in society more feasible for handicapped individuals." Senate Conference Report No. 93-318, Sept. 13, 1973; USCCA News, 1973, p. 2092.

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[3] The Board believes that the decision of the circuit court should be reversed because of Ms. Davis' inability to perform safely in her required clinical courses. For this reason, the questions of her being allowed to sit for the licensing exam or of her ultimate employment as a registered nurse are not within the scope of the interest of the *amicus curiae* in this case, and will not be considered in this brief.

On the contrary, the concern of Congress with considerations of safety is reflected in such enactments as the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.*, and in the provisions of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 *et seq.*, which require that programs for persons with developmental disabilities comply with "safety standards as may be promulgated by the Secretary." 42 U.S.C. §6010(3)(B)(vi).[4]

The Board submits that the district court correctly determined that Ms. Davis was not an "otherwise qualified handicapped individual" whose admission to the nursing program was mandated by section 504.

Further, the Board submits that the circuit court was in error in concluding that definitions of the implementing regulations mandated her admission.

Under these regulations, a

> "qualified handicapped person * * * (3) with respect to postsecondary and vocational education services, [is] a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity." 45 C.F.R. §84.3(k)(3).

Appendix A - "Analysis of Final Regulations", in discussing §84.3(k)(3), explains that "both academic and technical standards must be met by applicants to these programs. The term 'technical standards' refers to all non-

[4] An epileptic, such as the applicant about whom the Board is concerned, would be a person with a "developmental disability." 42 U.S.C. §6001(7).

academic admissions criteria that are essential to participation in the program in question." 42 Fed. Reg. at 22687.

The ability to perform with reasonable safety the tasks essential to participating in her clinical nursing courses was a "technical standard" which Mrs. Davis did not meet, if the phrase "technical standard" is to be given the meaning explained in the "Analysis". Such an interpretation is consistent with the district court's "ordinary common meaning definition" of the statutory "otherwise qualified."[5]

CONCLUSION

For the reasons stated above, the *amicus curiae*, the Board of Trustees of Prince George's Community College, respectfully urges that the decision of the circuit court should be reversed.

Respectfully submitted,

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[5] Representatives of the Policy Planning Office of the Office of Civil Rights, Department of Health, Education and Welfare, have advised the attorney for the *amicus curiae* on several occasions since September, 1978, most recently in January, 1979, that a policy interpretation document concerning the consideration which may be given to safety in admissions decisions is presently working its way through the agency. This is the result of a series of requests from the attorney to H.E.W., beginning in mid-1977.